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IN THE
Supreme Court of the United States

OCTOBER TERM, 1906.

No. 138.

J. T. SMITHERS, *Plaintiff in Error,*

vs.

T. SMITH, ET AL., *Defendants in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.
(19,943.)

BRIEF OF PLAINTIFF IN ERROR.

DAVID T. ROMAN,
FRANK E. DYCUS,
Attorneys for Plaintiff in Error.

B. H. TAYLOR, Printer, Fort Worth, Texas

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ABSTRACT OR STATEMENT OF THE CASE.

On Septembc 2th, 1903, J. T. Smithers, plaintiff in the court below, filed his original petition in the Circuit Court of the United States for the Northern District of Texas at Fort Worth, the petition being in the ordinary form of the Texas action of trespass to try title, therein claiming to have been in possession of and to be the owner, by title in fee simple, of 1,280 acres of land described here for the sake of brevity as Sections Nos. 27 and 91, fully described in

the petition both by field notes as given in the patents and by physical objects found on the ground. (Record, pp. 2 and 3.) Messrs. Smith, Greer, Deven and Reagan were made defendants under allegations that they had wrongfully entered upon the land and ejected plaintiff therefrom on January 15th, 1902, and that they withheld possession of the land from plaintiff. The two surveys of land were in one body, making a parolelogram one mile wide and two miles long. (Record, p. 2.) The tract was alleged to be of the value of $5,000.00. The rental value of the property $150.00 per annum, and plaintiff averred that he had been damaged in the sum of $2,000.00 by reason of his ouster by said defendants and the removal and destruction by them of certain fences on and around the land, etc. (Rec., p. 4.) Plaintiff averred that he was a resident and citizen of the State of New York, and that said defendants were each and all citizens and residents of Floyd County in the Northern District of Texas. Messrs. Montieth, Pendleton and Hall, residents and citizens of Bell County, Texas (Rec., p. 1), Alexander Anderson a resident and citizen of Pike County, Illinois, and J. B. and Ella Daniel residents and citizens of the State of Kentucky, were made parties defendant, on the ground that they were warrantors of plaintiff in conveyances made by them to said lands under which plaintiff held, it being averred that the entry of the trespassing defendants gave to plaintiff a cause of action against his warrantors. The facts showing payment of purchase money to the warrantors, their conveyances and covenants of warranty being fully pleaded. (Rec., pp. 2 and 3.) The references here are to the printed record in each instance.

An acceptance of service was filed by Montieth Pendleton and Hall. Citations were issued and were duly served upon all of the defendants except Alexander Anderson and John Deven. (Rec., p. 6.) No service was ever had upon Anderson or Deven, nor did they ever appear or answer. (Rec., p. 7.) Smith, Greer and Reagan appeared and filed separate answers, each disclaiming title to all of the land except a specific tract described by metes and bounds in his answer (Rec., pp. 8 and 9) as to which each pleaded that the land claimed by him was of less value than $2,000; that the amount in dispute between himself and the plain-

tiff did not exceed $2,000.00; that he did not claim any of the land jointly with his co-defendants but separately, and that each defendant claimed a separate tract, of value less than $2,000.00. Each denied a joint trespass; alleged that plaintiff's allegation of a joint trespass was fraudulent, and pleaded that the court had no jurisdiction of the case. (Rec., pp. 8 and 9.) February 21, 1905, plaintiff filed his first amended original petition in lieu of his said original petition, the only change made being that C. F. Lee, a resident and citizen of Jack County, Texas, was made a party to the suit under an allegation that he jointly with the other defendants had taken possession of plaintiff's land, had ousted plaintiff from the land and withheld possession of the land from plaintiff since January 15, 1902. (Rec., pp. 23, 24 and 25.) Plaintiff pleaded that the land *now* exceeds in value $5,000.00 (Rec., p. 25); that his damages were $2,000.00 (Rec., p. 27); that defendants had destroyed or removed the improvements on the land; that the rental value of the land was $150.00 per annum. (Rec., p. 27.) It was further averred that the object of the suit was to recover the land, the damages, rents, etc., and to fix and establish the boundaries to sections 27 and 91. (Rec., p. 25.) The petition contained all other allegations set forth in the original petition ,and plaintiff pleaded that he had also acquired title through adverse possession of the land under the statutes of limitations of Texas of three and five years. (Rec., p. 25.) C. F. Lee, having been duly served with citation, appeared and filed his plea to the jurisdiction of the court, disclaiming title to all of the land sued for except a small tract described by him by metes and bounds, alleging its value at less than $2,000.00, and averring that the defendants each claimed a separate tract; that they did not claim jointly and that the allegation of a joint trespass was fraudulently made. (Rec., p. 28.)

The defendants moved for a severance, but this was denied, and March 31st, 1905, the cause was submitted to the court upon the separate pleas of the defendants Smith, Greer, Reagan and Lee to the jurisdiction of the court, and the pleas sustained, the cause dismissed for want of jurisdiction, and all costs adjudged against the plaintiff. (Rec., p. 37.)

Thereafter on April 8th, 1905, the plaintiff filed his assignment of errors, and his petitioin for a writ of error. (Rec., pp. 39 and 40.) The petition was allowed by the court, the bond fixed (Rec., p. 40) and a certificate made by the court that the cause was dismissed for want of jurisdiction, and the writ of error granted to this court solely on the question of the jurisdiction of the Circuit Court. (Rec., p. 48.) Plaintiff executed and caused the writ of error bond to be filed (Rec., pp. 48 and 49), the same having been duly approved by the court. (Rec., p. 49.)

A bill of exceptions was prepared, signed and allowed by the court, and filed. (Rec., p. 41.) The citation in error duly issued, service accepted by the defendants. (Rec., pp. 51 and 52.) The writ of error duly issued and returned. (Rec., p. 49.) The record prepared and filed in this court, and the action of the Circuit Court in dismissing the case for want of jurisdiction is before this Honorable Court for review and correction.

POINTS RELIED UPON BY PLAINTIFF IN ERROR FOR A REVERSAL OF THE JUDGMENT DISMISSING THE CASE FOR WANT OF JURISDICTION.

(1) The value of the land sued for exceeded the sum of $2,000.00. The rents on the lands, with damages exceeded the sum of $2,000.00 in value besides the interest and costs.

(2) The action was brought to fix the boundaries to sections Nos. 27 and 91, being one tract or body of land containing 1,280 acres, of the value of $3,840.00, when the suit was brought, and formerly enclosed and used by plaintiff, but claimed by defendants as conflicting with the boundaries of their tracts and now in their possession.

(3) On February 21st, 1905, the date of the filing of plaintiffs first amended original petition, the land sued for exceeded the value of $5,000, and was, to-wit: of the value of $4.00 per acre, besides rents and damages claimed, exceeding $2,000.00; the court had jurisdiction at that time, and it is immaterial when its jurisdictioin was acquired.

(4) At the date of the trial on the plea to the jurisdiction, the amount in dispute and diversity of citizenship of the parties, gave the lower court jurisdiction.

(5) The trial court erroneously refused to consider the value of the land with rents and damages at the date plaintiff's amended petition was filed, or at the time of the trial on the pleas to the jurisdiction.

(6) The evidence undisputably shows that defendants Greer and Smith were joint trespassers and in common use of lands sued for by plaintiffs, which, with rents and damages, exceeded the sum or value of $2,000.00.

(7) All of the defendants were properly joined in one action, and the court erred in dismissing the case.

BRIEF OF ARGUMENT.

The assignments made and filed in the trial court, with the petition for writ of error, will be now taken up and discussed in their order.

FIRST ERROR SPECIFIED.

(First Assignment of Error in the Record.)

The Circuit Court erred in holding that it did not have jurisdiction of this cause, because it was shown that there was the necessary diversity of citizenship between plaintiff and the defendants, and that the value of the land in controversy was $3,840.00, exclusive of the rental value and damages sued for, and that plaintiff had a right to join all of the defendants in one action inasmuch as the issue in the cause was the true location of the boundary lines of surveys Nos. 27 and 91, being the entire 1,280 acres in controversy. (Rec., p. 39.)

STATEMENT FROM THE RECORD.

The land sued for was of the value of $4.00 per acre on February 21st, 1905, when the plaintiff's amended petition was filed. That was its market value. Both Massie and Bartley so testified, and no witness denied it. (Rec., p. 46.) The rental value of sixty acres, cultivated by Smith

and in his possession, was $1.50 per acre per annum for the three years it had been used by him, and 3½ to 5c per acre per annum for the balance of the land. Plaintiff Smithers, it was agreed, owned sections 27 and 91, patented as containing 1,280 acres of land. (Rec., p. 42.) Plaintiff's grantors, Montieth, Pendleton and Hall fenced the 1,280 acres in controversy in 1892 with a substantial fence, claiming it to be sections 27 and 91. (Rec., p. 45.) There was six miles of fencing, one mile on the north and south, respectively, and two miles both on the east and west. (Rec., p. 45.) Massie and Bartley each used the land as tenants of Montieth, Pendleton and Hall and plaintiff (to whom the later conveyed the land in September, 1902) after 1892 for some years. (Rec., pp. 45 and 46.) Smith, one of the defendants, who occupied land west of the plaintiff's enclosure, finally moved plaintiff's fence further east so as to take into his own enclosure part of plaintiff's land. (Rec., p. 45.) Defendants Smith and Greer had at first the use in common of all of the land in plaintiff's enclosure, except of a part which Reagan fenced off. (Rec., p. 46.) Greer afterwards ran a fence through the enclosure, fencing off about 187 acres of the land formerly in plaintiff's enclosure. (Rec., p. 46.) Also see sketch between pages 46 and 47, showing, by lines in red, the land fenced by plaintiff and of which he was dispossessed. At the time of the trial there was inside of Smith's enclosure 720 acres of land formerly embraced in plaintiff's enclosure, of which he claimed title. Smith only claimed title to 600 acres of land, eighty acres of the land inside of his fence and a part of the land claimed by plaintiff was claimed by defendant Greer as a part of his tract, and he promised to pay Greer rent for it, and did pay it. He did not claim the tract of about 160 acres situated east of the east line of section 28 as claimed by him, and the eastern red line of sections 27 and 91 as shown on the sketch. (Rec., p. 43.) Both Smith and Greer turned cattle into plaintiff's enclosure and used it in common till March, 1903, when Greer fenced off all the land claimed by him in plaintiff's enclosure except eighty acres, which he leased to Smith. (Rec., p. 43.) At the time suit was filed Smith claimed title to 443 acres of the land fenced by Montieth, Pendleton and Hall, Reagan 288 acres, Greer 187 acres and

Lee 96 acres, making 1,034 acres. (Sketch, Rec., p. 47.) It was agreed by the parties that the purpose of the suit was to fix and establish the boundaries of sections Nos. 27 and 91. (Rec., p. 42.) That plaintiff was the owner, by title in fee, of surveys Nos. 27 and 91. Defendant Smith was the owner of survey No. 28, Greer of survey No. 90, Reagan the owner of survey No. 31, and Lee the owner of survey No. 32, all by title in fee simple. (Rec., p. 42.) Witness Massie testified that he told the plaintiff's attorneys about how much of the plaintiff's land each defendant claimed, he did not know that the defendants' fences were on the lines claimed by them, but he could approximate how much the defendants' claimed. (Rec., p. 46.) Smith and Greer and Reagan each denied that they acted jointly in taking possession of plaintiff's land. (Rec., p. 44.) Some of the witnesses testified that the land was worth from $2.50 to $3.00 per acre when the suit was brought. (Rec., p. 47.) Reagan moved plaintiff's north and a portion of the west fence south and east and took possession of 288 acres of land in plaintiff's possession. The fence around plaintiff's pasture and appropriated and moved by defendants was worth $50.00 per mile. (Rec., p. 45.) The court, who heard the evidence, held:

(1) That he would not consider the value of all the land in Smith's possession, which was formerly in plaintiff's possession, but the value only of such land as Smith claimed. (Rec., p. 47.)

(2) That he would not consider the value of the land at the time of the trial or at the time plaintiff's amended petition was filed, but would limit his consideration to the value of the land and the rental value at the time the suit was filed. He therefore found that the matter in dispute was less than $2,000.00, and dismissed the suit. (Rec., p. 47.)

FIRST PROPOSITION OF LAW THEREUNDER.

A joint trespass by the defendants upon the enclosed lands of the plaintiff authorized an action by the plaintiff to join all of the defendants in one suit.

AUTHORITIES.

Greer vs. Mezes, 24 How., 268, 16 L., 663.
L. & N. Ry. Co. vs. Smith, (C. C. A.), 128 Fed., 5.
McGuire vs. Pensacola City, 105, Fed., 679.
1 Pom. Eq. Jur., Secs. 145-273.

SECOND PROPOSITION.

The right to fix and establish the boundaries of the entire 1,280 acres being the object of the suit, as to each and all of the defendants, the value of the entire tract is the matter in dispute.

AUTHORITIES.

L. & N. Ry. Co. vs. Smith, 128 Fed., 5.
Munsey vs. Matfield (Tex.), 40 S. W., 346.

SECOND ERROR SPECIFIED.

(Second Assignment of Error in the Record.)

The said Circuit Court erred in holding that it did not have jurisdiction of the suit as between the plaintiff and the defendants, Smith and Greer, for the reason that they were joint trespassers upon a part of plaintiff's land, which exceeded the sum of $2.000.00, and there being the necessary diversity of citizenship and the amount in controversy exceeding the sum of $2,000.00 the court should have taken jurisdiction of said suit. (Rec., p. 39.)

PROPOSITION OF LAW THEREUNDER.

A disclaimer by the defendants, or either of them, does not take away the jurisdiction of the court, which is fixed by the claim of the demandant.

AUTHORITIES.

Green vs. Liter, 8 Cranch, 230, 3 L. Ed., 545.
Way vs. Clay, 140 Fed., 355.
McGuire vs. Pensacola City Co., 105 Fed., 679.

SECOND PROPOSITION THEREUNDER.

Where the Circuit Court dismisses a case for lack of jurisdictional value, the evidence on which that conclusion is reached must be shown of record to a legal certainty. The lack of jurisdiction must clearly appear.

AUTHORITIES.

Barry vs. Edmunds, 116 U. S., 553.
Wetmore vs. Reimer, 169 U. S., 115, 42 L., 683.
Waterworks vs. Ryan, 181 U. S., 409, 45 L., 937.
Gage vs. Pumpelly, 103, U. S., 164, 21 L., 668.

THIRD PROPOSITION THEREUNDER.

The Supreme Court will look into the facts, review the evidence and determine whether it supports the action of the Circuit Court in dismissing the case for lack of jurisdiction.

AUTHORITIES.

Wetmore vs. Reimer, 169 U. S., 115, 42 L., 683.
Steglider vs. McGusten, 198 U. S., 140, 49 L., 986.

THIRD ERROR SPECIFIED.

(Third Assignment of Error in the Record.)

The court erred in holding that it could not take into consideration the value of the land in controversy as between the plaintiff and the defendant Smith at the time the plaintiff's amended petition was filed, but was confined to the value of the land and the rental value thereof as the same existed at the time of the institution of the suit. (Rec., p. 39.)

FIRST PROPOSITION THEREUNDER.

The jurisdiction of the Circuit Court is fixed by the matter in dispute at the date of the decree rendered in that court.

AUTHORITIES.

Knapp vs. Banks, 2 How., 74, 11 L., 184.
Keller vs. Ashford, 133 U. S., 610, 33 L., 670.
Mass. Benefit Ass'n vs. Miles, 137 U. S., 689, 34 L., 835.

SECOND PROPOSITION THEREUNDER.

It is sufficient to give jurisdiction to the court, that it had jurisdiction at the time the decree was rendered, and it is immaterial how long before that time its jurisdiction had attached.

AUTHORITIES.

Washer vs. Bullitt Co., 110 U. S., 558, 28 L.
Pacific Ry. Co. vs. Ketchem, 101 U. S., 289, 25 L., 936.
First Nat'l Bank vs. Bedford Tr. Co., 80 Fed., 572.

THIRD PROPOSITION THEREUNDER.

In the action of trespass to try title in Texas, the plaintiff may, by amendment, set up a new cause of action or a new title inquired by him after the suit was brought. The cause thereupon proceeds as a new suit based on such amendment.

AUTHORITIES.

Collins vs. Ballew, 72 Tex., 330.
Ballard vs. Carmichael, 83 Tex., 359.
Sinsheimer vs. Kahn, 24 S. W., 535.
Schmidt vs. Huff, 28 S. W., 1055.

FOURTH ERROR SPECIFIED.

(Fourth Assignment of Error in the Record.)

The court erred in holding that it had no jurisdiction of this cause, because the uncontroverted evidence shows that the land in controversy was of the value of $3.00 per acre; that the damages claimed were $2,000.00; that there was 1,280 acres in controversy between the plaintiff and the defendants, and the amount involved far exceeded the jurisdictional value of the court, and the defendants had such

interest as made them jointly suable by the plaintiff. (Rec., p. 39.)

FIRST PROPOSITION THEREUNDER.

The disclaimer by the defendants of lands found in their possession did not take away the jurisdiction of the court, provided said lands exceeded in value, with the damages and rents, the sum of $2,000.

AUTHORITIES.

Green vs. Liter, 8 Cranch, 229.
Galbreath vs. Howard, 32 S. W., 808.
Wooters vs. Hall, 67 Texas, 513.
Dykes vs. Miller, 24 Tex., 422.
Capt. vs. Stubbs, 68 Tex., 225.
Tate vs. Wyatt, 77 Tex., 412.

SECOND PROPOSITION THEREUNDER.

The jurisdiction of the court as between plaintiff and Smith and Greer is not to be determined by the value of the right of the present possession but by the value of the entire 720 acres of the land in controversy now in Smith's possession.

AUTHORITIES.

Black vs. Jackson, 177 U. S., 335.

ARGUMENT.

No issue was raised in the trial court by the pleas to the jurisdiction urged by the defendants, that there was not the necessary diversity of citizenship of the parties or that the value of the whole tract claimed by plaintiff and which he possessed up to the time he was ejected by defendants did not exceed in value the sum of two thousand dollars, added to which was the value of the rents and damages. The assault upon the jurisdiction was based upon the contention that the defendants each claimed a separate tract of the land, and that the value of each tract alone was the test

of the court's jurisdiction, and the further contention that defendants had not been guilty of a joint trespass on the land and that the allegation of joint trespass had been fraudulently made.

The following jurisdictional allegations were made by plaintiff in his pleading:

(1) That plaintiff was a resident and citizen of the State of New York and defendants were residents and citizens of the State of Texas.

(2) That the value of the 1,280 acres sued for was $5,000.00; that plaintiff was entitled to damages, growing out of ejection and dispossession of property, in the sum of $2,000.00; that the rents from July 15th, 1902, to the time of trial, March, 1905, were $1.50 per acre, or $450.00; total, $7,450.00.

The uncontradicted evidence disclosed:

(1) That plaintiff was the owner of the 1,280 acres known as surveys Nos. 27 and 91, claimed by him to cover the land in controversy. (Rec., p. 42.)

(2) That plaintiff's vendors, Montieth, Pendleton and Hall, enclosed the land in controversy by a substantial fence, and took possession and used the land, claiming it to be surveys Nos. 27 and 91. After plaintiff's purchase his fences were torn down and removed by Smith, and plaintiff was dispossessed of the land by Smith and Reagan. At least they turned their stock in the enclosure and admitted that they took and had common use of the pasture till Greer fenced off a part of it. (Rec., pp. 43 and 44.) Reagan fenced off a part and Lee the balance, so that all the fencing owned by plaintiff surrounding the land in controversy on the north and west was removed by Smith, Greer and Reagan. (Rec., p. 44.)

(3) The value of the land when the suit was brought in September, 1903, was, according to the testimony of some of the defendants' witnesses, only $2.50 to $3.00 per acre. (Rec., p. 47.) Defendant Reagan gave its value as $3.00 per acre, witness Mickey gave it at $3.25 per acre, defendant Greer at $3.25 per acre. Witnesses Bartley (Rec., p. 45)

and Massie (Rec., p. 46) testified that the value of the land, when the amended petition was filed, was $4.00 per acre.

(4) The rental value of the sixty acres of land in cultivation, being part of the land sued for, was admitted by defendants to be $1.50 per acre per annum, which, for three years, would make $270.00. (Rec., p. 45.)

(5) Smith had possession of 720 acres of the land claimed by plaintiff and at $3.00 per acre this would give a total of $2,160.00, and of this land Smith denied that he had ever claimed 160 acres, and stated that Greer claimed eighty acres out of the tract, and that he was paying rent to Greer on the tract. (Rec., p. 43.)

(4) The rental value of the land, except the sixty acres in cultivation, was from 3½c to 5c per acre (say 1,200 acres at 5c per acre, $60.00 per annum), or for three years $180.00; three miles of fence at $50.00 per mile.

To sum up—

Value of the 1,280 acres when amended petition was filed	$5,120
Rental value of grazing land	180
Rental value of farm, 60 acres	270
Fencing	150
Total	$5,720

Or should we fix the value of the land at the time the suit was brought this would reduce the amount only $1,280.00, leaving the remainder, $4,440, as its then value.

Now it was agreed that the object of the suit was to fix and establish the boundaries of the entire 1,280 acres, hence we say the judgment as between plaintiff and one of the defendants would necessarily be the same as to all of the others.

In a suit to establish boundaries to a specific tract of land, all persons claiming any part of the tract are necessary parties.

In Greer vs. Mezes, 24 How., 268, 29 L. Ed., 663, complaint was made by defendants that a judgment had been

rendered against the defendants jointly, although they had severed in their answers.

Mr. Justice Grier, speaking for this court, stated that while in an action of ejectment, a plaintiff will not be allowed to join in one suit several and distinct parcels in possession of several defendants each claiming for himself, but that he was not bound to bring a separate action against several trespasses on his separate, single and distinct tenement or parcel of land. Adding, as to plaintiff, all of the defendants are trespassers. The opinion recognizes the right of the defendants to separately answer and to have a separate trial where each defendant claims separately in order that he should not be made liable for costs unconnected with his separate litigation. Now there can be no question that the land was situated in a single enclosed tract a mile wide and two miles long. Why should the jurisdiction be ousted because the trespassing defendants have parcelled out among themselves the lands in plaintiff's possession? If this is the law it would follow in every case, that where a plaintiff was dispossessed of his premises of greater value than $2,000.00, he being a citizen of a different State from that in which defendants resided and had citizenship, the jurisdiction of the Federal Court could be ousted by defendants separately claiming separate tracts each of itself below the jurisdictional value.

An action brought to fix and settle boundaries is governed by a somewhat different rule than that which ordinarily applies to the action of ejectment. For not only is the title and right to possession usually involved, but there is in addition a doubt and uncertainty as to the true location on the ground of the lines and corners of the land in controversy and the rule as to necessary parties as limited in ejectment cases has no application to a boundary case.

A case in point is that of Muncey vs. Matfield, 40 S. W., 346, decided by the Court of Civil Appeals of Texas.

There Matfield sued Muncey who owned a survey on one side of his own survey, and Cotten who owned a survey on the other side; in other words, plaintiff claiming the Metzer survey, sued the land owners on both sides of his survey, seeking to establish the lines of his own survey. The

defendants pleaded that they were improperly joined because Cotten had no interest in the land claimed by Muncey, and the latter had no interest in the land claimed by Cotten. They were not even adjoining owners, the tract of plaintiff intervening between those claimed by Muncey and Cotten. Plaintiff Matfield, it must be observed, did not claim to own both the tract claimed by Muncey and that of Cotten, but believed that he was entitled to the land claimed by one or the other of them, and was in doubt as to where his lines should be located. The court held that there was no error in allowing the plaintiff to fully settle his boundaries in one action, saying, "We think this practice permissible. The plaintiff was in doubt as to where were the true boundary lines of his survey on each side and he had the right to settle and establish in one controversy the boundary lines of his land and to bring into that suit all parties who may be claiming adversely to him."

In Louisville & N. Ry. Co. vs. Smith, 128 Fed., 5, the Circuit Court of Appeals of the Fifth Circuit had before it the questions of jurisdictional value and misjoinder. That action was equitable in its nature, plaintiff joining in its bill all parties who were interfering with the proper use of its rights-of-way. Each defendant was claiming the right to cultivate the land claimed by him up to the end of the defendant's cross ties, and prevented plaintiff from using any of the balance of the land. The railway track passed through separate tracts belonging to the defendants in severalty.

It was claimed by the defendants that plaintiff could not give to the court jurisdiction by aggregating the value of the several parcels over which the right of way extended, and that there was a misjoinder of parties. In disposing of this contention Circuit Judge Shelby said in part:

"The rule, we think, is plain that when the matter in litigation is entire in itself and does not consist of separate things having no connection with each other it is not necessary that each defendant should have an interest in the suit co-extensive with the claim set up in this bill. He may have an interest in a part of the matter in litigation instead of the whole. There can be no reason why one one complain-

ant who has the same right against a number of persons—that right being such that it confers equity jurisdiction and may not have that right determined as to all the parties interested by one suit. The plaintiff's claim is an entirety. The right claimed is exactly the same as to each defendant. All the defendants are interfering in the same manner with the same right-of-way. As the case is one on the averments of the bill within the jurisdiction of a court of equity, there can be no reason for requiring the defendants to file fifteen separate bills—one against each defendant. It is no objection that the several defendants each have a right to make a separate defense, provided complainant's assertion of right is the same against each, and there is only one general question that pervades the whole case."

While the last case cited was an equity case, we conceive that there is no difficulty in applying the rule to an action at law to fix and establish boundaries and recover the land, for there is but one general question to be determined, and as to the plaintiff the defendants are joint trespassers upon his single enclosed tract, and a recovery as to one defendant would be so as to all.

Plaintiff rightfully joined his warrantors on their covenants of warranty. (McCreary vs. Douglass, 5 Tex. Civ. App., 276, 24 S. W., 367; Kirby vs. Estell, 75 Tex., 486; Norton vs. Collins, 1 Tex. Civ. App., 276.) Assuming that the defendants were joint trespassers they were properly joined in one suit.

In McGuire vs. Pensacola City Co., 105 Fed., 679, the Circuit Court of Appeals for the Fifth Circuit approved the rule in Greer vs. Mezes, supra, saying:

"If the defendants are trespassers, having obtained possession by force and violence, as alleged, they may all be joined in one action of ejectment."

Appropos to the rule cited, we call attention to the fact that the plaintiff was dispossessed of his enclosed lands by force and violence; that defendants took possession and removed the fencing, each man taking possession of a specific tract, but for a time using all the land in common."

The jurisdiction of the court is not ousted because the

defendant disclaims a part of the land sued for, so that the amount claimed by him is of less value than $2,000.

In Green vs. Liter, 8 Cranch, 230, 3 L. Ed., 545, the plaintiff sued to recover a large tract of land of value necessary to give jurisdiction. The judges of the Circuit Court being divided in opinion certified to the Supreme Court the following among other questions:

"Has the Circuit Court jurisdiction in a writ of right where the land claimed by the demandant is above the value of $500.00 but the tenement held by the tenant is of less value than $500.00?"

Mr. Justice Story answered without equivocation or argument as follows:

"As to the first question, we are satisfied that the Circuit Court had jurisdiction of the case. Taking the 11th and 20th sections of the judicial act of 1789, ch. 20, in connection, it is clear that the jurisdiction attaches where the property demanded exceeds $500 in value, and if, upon the trial the demandant recovers less, he is not allowed his costs, but at the discretion of the court may be adjudged to pay costs."

While the court in that case denied the right of the plaintiff to join in his action, defendants claiming separate tracts by independent titles, the case was one merely in ejectment, and did not involve the issue of boundary, or the case of an ejection of plaintiff by defendants from the peaceable possession of a fenced enclosure.

In Lanning vs. Dolph et al., Fed. Cas. No. 8073, the plaintiff failed to allege the value of the land sued for, and the case was dismissed on a plea to the jurisdiction, but the plaintiff was allowed to reinstate, notwithstanding the defendant Dolph offered to prove by affidavits that the value of the land in his possession was less than $500. Mr. Justice Washington seemed, however, to be in some doubt as to whether the land in defendant's possession, or that claimed by plaintiff, was the matter in dispute.

In May vs. Clay, 140 Fed., 355, the defendant claimed only about 45 acres of the land sued for, made his separate defense and plea to the jurisdiction of the court, and it was

agreed that the land described in his plea was of less value than $2,000. Upon motion to strike out the plea to the jurisdiction Judge Keller granted the same, saying:

"If I own 1,000 acres of land and find another in possession of and claiming 100 acres therein, the possession of this 100 acres is as to me, a disturbance of my possession of my 1,000 acres. I have no 100-acre tract possessing a value as 100 acres, but I have 1,000 acres, the value of which may be impaired to me by the unlawful possession of the 100 acres, part thereof by the defendant, and my loss of the 100 acres might and often would affect the free use and enjoyment of the entire remainder of my land. So that the 100 acres, which might seem to the defendant the matter in dispute, would, in the eyes of the plaintiff, not be the matter in dispute * * * and the matter in dispute, from the standpoint of the plaintiff, would be his right to the undisturbed possession of his 1,000-acre tract."

Where a defendant disclaims, plaintiff may show that defendant was in possession of the land when the suit was brought and that damages sustained by plaintiff, and therefore recover the land with damages and costs. (Dykes vs. Miller, 24 Tex., 422; Wooters vs. Hall, 67 Tex., 513; Capt. vs. Stubbs, 68 Tex., 225; Tate vs. Wyatt, 77 Tex., 412.)

Jurisdiction should, in any event, have been retained over the controversy so far as plaintiff and the defendants Smith and Greer are concerned.

Smith and Greer had the use in common of all the land of which plaintiff had been dispossessed till about March, 1903, when Greer put a fence through the enclosure, but even then he left in the general enclosure eighty acres of the land claimed by him for which Smith promised to pay him rent. (Rec., p. 43.)

Now here there is no pretense that plaintiff knew how much of the land each defendant had taken possession of. It is true that one witness (Massie) testified that he had informed plaintiff's attorneys about how much each defendant *claimed* (Rec., p. 46), but there is no evidence that witness knew or had ever informed plaintiff's attorneys as

to how or by whom of the respective defendants the land was fenced and appropriated. (Rec., p. 47.) The fact is manifest that Greer, in fencing off that part of the land in plaintiff's enclosure claimed by him, failed to run on the line as claimed by him, so that, by mistake or otherwise, he left eighty acres in Smith's enclosure. Clearly as to this Smith and Greer were properly joined—one as landlord, the other as tenant. The Revised Statutes of Texas (1895), Art. 5255, provides:

"The plaintiff may join as a defendant, with the person in possession, any other person, who as *landlord*, remainderman, reversioner or otherwise may claim title to the premises or any part thereof adversely to the plaintiff."

Recognizing that line of cases of the courts of the United States which hold that where the defendants severally claim separate parcels of land, each of which, with the damages and rents added, does not exceed the value of $2,000, that the value of the various tracts cannot be aggregated to give the court jurisdiction, we respectfully submit that none of them are applicable to the case at bar, because we find here a plaintiff whose land greatly exceeded the value of $2,000, and who, while in possession, through his tenants, of his fenced enclosure, embracing one compact whole, was forcibly dispossessed by the defendants. They are as to him joint trespassers, especially is this true as to Smith and Greer, because Smith held the 720 acres of greater value than $2,000, partly for himself, partly as tenant for Greer and partly as a naked trespasser. (Rec., p. 44.)

Besides, what evidence was there that substantial damages could not be recovered? The defendants Smith, Greer and Reagan had taken down plaintiff's fence and had moved it away and placed it on other lines, and had taken and had the exclusive use of the whole tract—though each claimed a specific part only of the land. It is significant, too, that Smith and Greer, while moving plaintiff's fence, did not move it on the line which they claimed separated their surveys from those of plaintiff, but left all of the land in their enclosures.

The case of Barry vs. Edmunds, 116 U. S., 550, 29 L., 732, is much in point. There the Circuit Court held that

the amount of taxes due the State of Virginia was less than $100, and the property levied upon was of less value than $200, and the Circuit Court, therefore, held that the amount in dispute was less than $500 and that the court had no jurisdiction.

Your Honors held that the order dismissing that case was reviewable by this Honorable Court, and upon consideration of the case, held that where there was a wilful and malicious trespass, the amount of damages laid in the declaration must furnish the test of the jurisdiction, and therefore reversed the judgment of dismissal, citing with approval the rule laid down in Kolb vs. Bankhead, 12 Tex., 228, to the effect that in a case of cutting down and carrying away timber where the defendant wilfully or negligently cut over his own line, the plaintiff would not necessarily be confined to the value of the property taken, but the jury "could give such damages as the facts were deemed by them to warrant, and as would in their judgment be adequate, not only for compensation, but also for prevention." The case of Barry vs. Edmunds is decisive, too, because it illustrates that in cases of trespass, where damages exceeding $2,000 are claimed, the jurisdiction of the Circuit Court cannot be defeated merely because the property sued for is not of value sufficient to give jurisdiction. The case is rich in citations of authorities supporting the rule.

Black vs. Jackson, 177 U. S., 355, 44 L., 805, seems to support our contention that the value of the entire 720 acres in Smith's possession as well as the value of the rents and damages must be taken into account in determining the question of jurisdiction.

Value of the "matter in dispute" must be determined by the value at the time of the judgment.

It has been held by this court that its appellate jurisdiction in action upon contracts "must be determined by the amount in controversy, including interest at the date of the decree." (Keller vs. Ashford, 133 U. S., 610, 33 L., 670.)

In Mass. Benefit Ass'n. vs. Miles, 137 U. S., 689, 34 L., 835, on motion to dismiss for want of jurisdiction this court said, "Where interest antecedent to the judgment appealed

from is included in such judgment and the amount with added interest exceeds $2,000, jurisdiction will attach."

In Knapp vs. Banks, 2 How., 74, 11 L., 184, Mr. Justice Story said:

"The amount in controversy is to be decided by the sum in controversy *at the time of the judgment* and not by any subsequent additions thereto, such as interest. * * * "

An amendment may set up a new cause of action, and if the amount in dispute at the time it was filed exceeds $2,000, jurisdiction attaches.

Plaintiff filed an amended petition on February 21st, 1905, wherein it was alleged that the land sued for was of the value of $5,000 at that time. (Rec., p. 23.) Both witnesses Massie and Bartley, testified that the land sued for was of the value of $4.00 per acre at that date (Rec., pp. 45, 46), so that even if we deduct from the 720 acres of the land sued for in Smith's possession, the 160 acres which he said he did not claim, it would still leave 560 acres, of the value of $2,240, on February 21st, 1905, besides rents, $270, and damages to be recovered against Smith, and Greer his landlord, as to part of the land. (Rec., pp. 44, 45 and 46.)

The Circuit Court held that he would not take into consideration "the value of the land at the time plaintiff's first amended petition was filed or at the time the same was tried on defendants' pleas to the jurisdiction, with rental values of the lands up to that time as claimed by Smith, *but would confine himself* to the value of the lands and the rental values thereof as claimed by Smith as the values existed at the time of the institution of the suit." (Rec., p. 47.)

As we understand the authorities, this holding was clearly erroneous.

In Washer vs. Bullett County, 110 U. S., 558, 28 L., 249, plaintiff, in his original petition, sued to recover $3,184.35. By the amended petition afterwards filed it was averred that the sum of $5,325.14 was due the plaintiff. A motion was made to dismiss the appeal in the Supreme Court because there was no jurisdiction. The court denying the motion, said in part, "When a petition is amended by leave

of the court the cause proceeds on the amended petition. It was upon the amended petition that the judgment of the court below was given, and the question brought here by this writ of error is the sufficiency of the amended petition. *If its averrments show that this court has jurisdiction the jurisdiction will be maintained without regard to the original petition.*" See also Jackson vs. Ashton, 10 Pet., 480.

In Pac. Ry. Co. vs. Ketcham, 101 U. S., 289, 25 L., 936, it was held not material to enquire when the Circuit Court first acquired jurisdiction. It was sufficient if jurisdiction existed when the decree was rendered.

The case of First National Bank vs. Bedford Tr. Co., Fed., 572, was one decided by the Circuit Court of Appeals of the Sixth Circuit.

It involved among other questions that of jurisdiction. The court, composed of Justices Taft and Lurton, speaking through Circuit Judge Lurton, said:

"The jurisdiction of the court seems never to have been brought to the notice of the court below until after an amended and supplemental bill had been filed by the complainant and the cause about ready for hearing. In considering this question of jurisdiction we shall therefore consider the status of the case as it appears upon both the original and amended bills. If the court had jurisdiction at the time a motion was first made to dismiss for want of jurisdiction, *and had jurisdiction when it entered the decrees appealed from*, it is of no moment on this record how long it had jurisdiction or at what prior stage of the cause it was acquired."

Art. 1188 of the Revised Statutes of Texas reads:

"All parties to a suit may in vacation amend their pleadings may file suggestions of death and make representative parties and make new parties * * * provided that it shall be the duty of the party filing such pleading to notify the opposite parties or their attorneys within five days from the filing of the same. All amendments to pleading, pleas and pleas of intervention must, when court is in session, be filed under the leave of court, etc." * * *

It has been well settled in Texas that the original peti-

tion in an action of trespass to try title is amendable and that the plaintiff may set up rights acquired by him since the suit was instituted. An amendment supersedes the original pleading and the cause is tried on the amended pleading as a new suit. (Collins vs. Ballew, 72 Tex., 330; Ballard vs. Carmichael, 83 Tex., 359; Sensheimer vs. Kahn, 24 S. W., 535; Schmidt vs. Huff, 28 S. W., 1055.)

In Schmidt vs. Huff, 28 S. W., 1053, the court held that plaintiff, by amendment, might set up a title acquired by him since the suit was filed, but if he recovered upon that title alone he might be subjected to the payment of the costs.

In the light of the foregoing authorities can there be a substantial doubt that if the matter in dispute by reason of increase in value of the land sued for, after the action was begun, the land and rents and damages in possession of anyone defendant were of greater value than before the plaintiff's amendment was filed, that the jurisdiction thereby attached whether it existed before that time or not?

We respectfully submit:

(1) That the court had jurisdiction of the case as between the plaintiff and all of the defendants as they were suable as joint trespassers. * * *

(2) That the want of jurisdiction was not made to clearly appear by the evidence.

The case of Wetmore vs. Rymer, 169 U. S., 115, 42 L., 682, is quite like the case at bar. There the Circuit Court had dismissed for want of jurisdictional value, finding from the evidence that the matter in dispute, to-wit: the land in defendant's possession did not exceed in value $2,000. This court reviewed the evidence and held that a lack of value had not been clearly proven. An inspection of that case will show that there was some evidence to support the judgment of dismissal, while on the other hand, as in this case, there was much evidence to the contrary. This court reversed the judgment, saying:

"A suit cannot properly be dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record

create a legal certainty of that conclusion." This language has been reaffirmed in the subsequent cases of Waterworks vs. Ryan, 181 U. S., 409, 45 L. 937, and Stezlider vs. McGusten, 198 U. S., 140, 49 L., 986.

This court in the Wetmore vs. Reimers case recognizes the fact that there is no question about which men differ more widely than that of the value of land.

In Butters vs. Carney, 127 Fed., 623, it was held that the burden was upon defendant to show that the matter in dispute did not exceed $2,000, and this is consistent with the statute and cases of this court which hold that the lack of jurisdiction should be shown to the "satisfaction" of the court.

In Herbert vs. Ramey, 54 Fed., 248, the fact that the allegations of value within the jurisdiction in the bill were not beyond what the plaintiff could reasonably hope to establish was held sufficient to support the court's jurisdiction.

We respectfully submit that the order of the Circuit Court dismissing the case for want of jurisdiction should be in all things reversed and remanded to this court for a proper trial on the merits, and we so pray this Honorable Court.

.....David T. Bowers
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Attorneys for Plaintiff in Error.